

FILED SEP 02 2009

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF OREGON

ROBERT W STRAUSS,	)	
	)	
Plaintiff,	)	Civil No. 08-931-AA
	)	OPINION AND ORDER
vs.	)	
	)	
COMMISSIONER OF SOCIAL SECURITY,	)	
	)	
Defendant.	)	
_____	)	

David B. Lowry  
9900 SW Greenburg Road  
Columbia Business Center, Suite 235  
Portland, Oregon 97223-5502  
Attorney for plaintiff

Kent Robinson  
Acting United States Attorney  
District of Oregon  
Adrian L. Brown  
Assistant United States Attorney  
1000 S.W. Third Avenue, Suite 600  
Portland, Oregon 97204-2902

Kathryn A. Miller  
Special Assistant United States Attorney  
Social Security Administration  
701 Fifth Avenue, Suite 2900 M/S 901  
Seattle, Washington 98104-7074  
Attorneys for defendant

AIKEN, Judge:

Plaintiff Robert Strauss brings this action pursuant to the Social Security Act, 42 U.S.C. §§ 405(g) and 1383(c)(3), to obtain judicial review of the Commissioner's decision. The Commissioner denied plaintiff's applications for Disability Insurance Benefits (DIB) under Title II of the Social Security Act. Because the Administrative Law Judge (ALJ) failed to comply with an express directive in the Appeals Council's remand order, I find his decision is not supported by substantial evidence and therefore remand for payment of benefits.

#### **PROCEDURAL BACKGROUND**

Plaintiff protectively filed his application for DIB benefits on December 23, 2003. Tr. 53-55. He alleged disability beginning October 31, 2001, due to left knee chronic neuropathic pain, hypertension, and depression. Tr. 81. Plaintiff's application for disability benefits was denied initially and upon reconsideration, and plaintiff requested a hearing before an ALJ on April 26, 2004. Tr. 41. On January 11, 2006, ALJ Timothy Terrill conducted a hearing ("the 2006 hearing"). Tr. 409-49. At the 2006 hearing, ALJ heard testimony from plaintiff; plaintiff's wife; plaintiff's son and daughter; and a vocational expert. Id. On February 23, 2006, ALJ Terrill issued a decision finding plaintiff not disabled

("the 2006 decision"). Tr. 12-25. The Appeals Council denied plaintiff's request for review on September 29, 2006 and plaintiff then filed a complaint in this Court. Tr. 3-5.

On July 29, 2007, this Court reversed the ALJ's decision and remanded the case for further administrative proceedings pursuant to a stipulation of the parties. Tr. 524-25. The order stated:

The ALJ will conduct a new hearing, further develop the record and issue a new decision;

The ALJ will evaluate and further develop the medical evidence or record;

The ALJ will consider Plaintiff's obesity pursuant to SSR 96-7p;

The ALJ will further consider Plaintiff's credibility pursuant to SSR 02-1p;

The ALJ will discuss and evaluate the lay witness testimony from Plaintiff's wife, June Strauss, son, Joshua Strauss, and daughter, Nicole Strauss;

The ALJ will re-evaluate Plaintiff's RFC pursuant to SSR 96-8p;

The ALJ will re-evaluate step four and if necessary step five of the sequential evaluation process with the assistance of a vocational expert, as necessary.

Id. On November 20, 2007, consistent with this Court's remand order, the Appeals Council remanded this case for further administrative proceedings, ordering the ALJ to:

Update the medical record with existing evidence from the treating sources, to include medical source statements (20 C.F.R. 404.1512);

Consider the claimant's obesity pursuant to Social

Security Ruling 02-1p;

Further evaluate the claimant's subjective complaints and provide rationale in accordance with the disability regulations pertaining to evaluation of symptoms (20 C.F.R. 404.1529) and Social Security Ruling 96-7p;

Evaluate the lay witness testimony by the claimant's spouse and two children pursuant to Social Security Ruling 06-03p;

Give further consideration to the claimant's maximum residual functional capacity and provide appropriate rationale with specific references to evidence in the record in support of the assessed limitations (20 C.F.R. 404.1545 and Social Security Ruling 96-8p);

Re-evaluate step four of the sequential evaluation and, if necessary, with the assistance of a vocational expert;

If warranted by the expanded record, obtain supplemental evidence from a vocational expert to clarify the effect of assessed limitations on the claimant's occupational base (Social Security Ruling 83-14), and to determine whether the claimant has acquired any skills that are transferable to other occupations under the general guidelines in Social Security Ruling 82-41. The hypothetical question should reflect the specific capacity/limitations established by the record as a whole. The Administrative Law Judge will ask the vocational expert to identify examples of appropriate jobs and to state the incidence of such jobs in the national economy (20 C.F.R. 404.1566). Further, before relying on the vocational expert evidence the Administrative Law Judge will identify and resolve any conflicts between the occupation evidence provided by the vocational expert and the information in the Dictionary of Occupational Titles (DOT) and its companion publication, the Selected Characteristics of Occupations (Social Security Ruling 00-4p).

Tr. 526-29. On April 24, 2008, ALJ Terrill conducted a supplemental hearing ("the 2008 hearing"). Tr. 693-715.

Plaintiff and a vocational expert testified at this hearing.

On May 29, 2008, ALJ Terrill issued a second decision finding

plaintiff not disabled ("the 2008 decision"). Tr. 450-65. Plaintiff subsequently filed a complaint in this Court.

#### **STATEMENT OF THE FACTS**

Plaintiff was 44 years old on the alleged onset date of disability, and completed one year of college. Tr. 86. He worked as a recruiting manager, recruiter, sales representative, sales manager, district sales manager, technical training instructor, and president of a company, all in the computer services industry. Tr. 445. He also worked as a branch manager of an employment agency. Id. Plaintiff alleges disability beginning October 31, 2001. Pl.'s Br. 4, Tr. 81. Plaintiff was employed during the alleged time of disability. Tr. 547. He reported earnings of \$6,737.21 in 2003, \$1,418.54 in 2004, \$5,338.20 in 2005, and \$10,925.63 in 2006. Id. He had no earnings in 2002. Id.

#### I. Chronic Leg Pain

Plaintiff's primary complaint is extreme, fire-like pain in his left leg. Tr. 419, 709. In 1983, plaintiff sustained an injury to his anterior crutiate ligament (ACL) while practicing judo. Tr. 413. Plaintiff had a total of seven total surgeries, none of which successfully repaired the damage. Tr. 414. After the most recent surgery, in October 1997, plaintiff experienced excruciating and persistent leg pain. Id.

Plaintiff was treated at Pain Management Consultants from September 20, 2000, through July 16, 2002. Tr. 153-64. Id. From October 8, 2002, through December 11, 2003, plaintiff was treated at Advanced Pain Management Center, with appointments on a monthly basis for medication and pain management. Tr. 166-207. In September 2002, plaintiff was diagnosed with reflex sympathetic dystrophy. Tr. 205-07. Plaintiff has been prescribed a variety of pain medications, including OxyContin, Methadone, and Vicodin. Tr. 159, 192, 588. On January 24, 2008, plaintiff was taking 11 tablets of Methadone daily for pain. Tr. 588.

Plaintiff was also treated by Dr. Gregg Coodley from 1999 through 2008. Tr. 212-314, 588-692. On September 25, 2002, Dr. Coodley noted that plaintiff's knee MRI showed "chronic damage," and recommended referral to an orthopedist. Tr. 274-75. In a 2004 "Ability To Do Work-Related Activities" questionnaire, Dr. Coodley remarked that plaintiff's "level of pain is such that it limits his ability for any activity involving the left lower extremity." Tr. 218. Dr. Coodley indicated it would be reasonable to expect plaintiff would "experience substantial difficulty with stamina, pain or fatigue" if working full-time and noted plaintiff "would need to work at a reduced pace," even if his job involved light or sedentary levels of activity. Id. Dr. Coodley concluded

plaintiff could lift or carry 10 pounds frequently, 20 pounds occasionally, stand/walk less than 2 hours of an 8 hour workday, and would have to change position/posture more than once every two hours. Id.

On March 1, 2004, a non-examining physician completed a Residual Functional Capacity Assessment form. Tr. 330-35. He noted a primary diagnosis of "reflux sympathetic dystrophy LLE" and a secondary diagnosis of "left knee chondromalacia patellae grade four." Tr. 332. The non-examining physician concluded plaintiff could lift or carry 10 pounds frequently, and 20 pounds occasionally; stand/walk at least 2 hours of an 8 hour workday; and sit about 6 hours of an 8 hour workday. Tr. 334.

## II. Other Complaints

In the 2004 questionnaire, in addition to plaintiff's leg/knee pain, Dr. Coodley noted the following diagnoses: (1) possible dependency on opioid medication; (2) hypertension; (3) depression, and (4) recent hospitalization for drug overdose with suicidal ideation. Tr. 213. Dr. Coodley wrote that pain medication "may cause some mental incapacitation of poor concentration, memory problems . . . [and] irritability." Tr. 218. Treatment records and progress notes from November 30, 2005 through January 24, 2008, submitted after remand, indicate ongoing treatment with Dr. Coodley and Dr. Myron Lezak for (1) diarrhea/incontinence/abdominal pain related to irritable bowel

syndrome/colitis; (2) diabetes; (3) hypertension; (4) insomnia; and (5) depression. Tr. 588-692.

Following a two week period of chronic diarrhea in November 2005, plaintiff sought treatment with Dr. Lezak. Tr. 644. While plaintiff was initially diagnosed with Crohn's disease or chronic ulcerative colitis, when the diarrhea persisted despite treatment, Dr. Lezak changed the diagnosis to Bowel Dysmotility and Irritable Bowel Syndrome with some indication of Inflammatory Bowel Disease. Tr. 631. By September 26, 2006, plaintiff reported his diarrhea was "less," tr. 620, and by January 9, 2007, it was "resolved completely," tr. 612.

On February 24, 2004, a non-examining psychologist completed a Psychiatric Review Technique Form. Tr. 316-29. The examiner concluded plaintiff suffered from an affective disorder with depression and anxiety, assessing "mild" limitations in social functioning, concentration, persistence, and pace. Tr. 319, 321, 326. The psychologist remarked, "[m]ost limitation is due to physical problems." Tr. 328.

#### **STANDARD OF REVIEW**

This court must affirm the Secretary's decision if it is based on proper legal standards and the findings are supported by substantial evidence in the record. Hammock v. Bowen, 879 F.2d 498, 501 (9th Cir. 1989). Substantial evidence is "more



than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Richardson v. Perales, 402 U.S. 389, 401 (1971) (quoting Consolidated Edison Co. v. N.L.R.B., 305 U.S. 197, 229 (1938)). The court must weigh "both the evidence that supports and detracts from the Secretary's conclusion." Martinez v. Heckler, 807 F.2d 771, 772 (9th Cir. 1986).

The initial burden of proof rests upon the claimant to establish disability. Howard v. Heckler, 782 F.2d 1484, 1486 (9th Cir. 1986). To meet this burden, plaintiff must demonstrate an "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected . . . to last for a continuous period of not less than 12 months. . . ." 42 U.S.C. § 423(d)(1)(A).

The Secretary has established a five-step sequential process for determining whether a person is disabled. Bowen v. Yuckert, 482 U.S. 137, 140 (1987); 20 C.F.R. §§ 404.1520, 416.920. First the Secretary determines whether a claimant is engaged in "substantial gainful activity." If so, the claimant is not disabled. Yuckert, 482 U.S. at 140; 20 C.F.R. §§ 404.1520(b), 416.920(b).

In step two the Secretary determines whether the claimant has a "medically severe impairment or combination of

impairments." Yuckert, 482 U.S. at 140-41; see 20 C.F.R. §§ 404.1520(c), 416.920(c). If not, the claimant is not disabled.

In step three the Secretary determines whether the impairment meets or equals "one of a number of listed impairments that the Secretary acknowledges are so severe as to preclude substantial gainful activity." Id.; see 20 C.F.R. §§ 404.1520(d), 416.920(d). If so, the claimant is conclusively presumed disabled; if not, the Secretary proceeds to step four. Yuckert, 482 U.S. at 141.

In step four the Secretary determines whether the claimant can still perform "past relevant work." 20 C.F.R. §§ 404.1520(e), 416.920(e). If the claimant can work, he is not disabled. If he cannot perform past relevant work, the burden shifts to the Secretary. In step five, the Secretary must establish that the claimant can perform other work. Yuckert, 482 U.S. at 141-42; see 20 C.F.R. §§ 404.1520(e)-(g), 416.920(e)-(g). If the Secretary meets this burden and proves that the claimant is able to perform other work which exists in the national economy, he is not disabled. 20 C.F.R. §§ 404.1566, 416.966.

## DISCUSSION

### I. The ALJ's Findings

At step one, the ALJ determined that plaintiff had

engaged in substantial gainful activity from November 2006, through January 2008. Tr. 455-56. This finding is not in dispute. Therefore, the period of time at issue in this case is approximately five years, from October 31, 2001, to November 2006.

At step two, the ALJ found the following severe impairments: reflex-sympathetic dystrophy syndrome in the left leg, and osteoporosis. Id. The ALJ found plaintiff suffered from colitis and depression, but categorized those impairments as non-severe. Id. He found the colitis non-severe because "it did not last for a continuous period of 12 months." Id. He found the depression non-severe because it "has been under adequate control with treatment and/or has not imposed severely limiting psychological symptoms." Id. The ALJ reached this conclusion based on the 2004 evaluation completed by non-examining psychologist. Id. The ALJ discredited Dr. Coodley's responses to the questionnaire indicating plaintiff's ability to work would be affected by his depression, anxiety, and opioid dependency because (1) "he is not a psychologist or psychiatrist;" (2) his responses on the questionnaire were "inconsistent" with his progress notes; and (3) he had previously reported plaintiff was "doing well" with regard to his depression. Tr. 457. The ALJ found plaintiff's obesity did not satisfy the criteria of a severe physical impairment,

and rejected allegations of memory problems because there was "no objective evidence" in the record to support the complaints. Id. These findings are in dispute.

At step three, the ALJ found that plaintiff did not suffer from an impairment or combination of impairments that meet or medically equal one of the listed impairments in the regulations. Id. This finding is not in dispute.

At step four, the ALJ found that plaintiff's limitations left him with the residual functional capacity (RFC) "to perform a limited range of light work." Id. According to the ALJ's assessment, plaintiff is able to lift 20 pounds occasionally and 10 pounds frequently; stand/walk for 15 minutes at a time for a total of 2 hours out of an 8 hour workday; sit for 30 minutes at a time with no overall limitations; and occasionally climb, balance, stoop, kneel, crawl, and crouch. Tr. 458. This finding is in dispute.

In adopting this RFC assessment, the ALJ determined plaintiff, plaintiff's wife, plaintiff's children, and Dr. Coodley were not credible regarding their descriptions of plaintiff's functional limitations. Tr. 453, 459-60. The ALJ based these credibility findings on his conclusion that evidence regarding plaintiff's activities of daily living conflicted with the testimony of plaintiff, his family, and Dr. Coodley. Id. The ALJ further discredited plaintiff's family

members' testimony because of their lack of medical expertise, and because their relationship with plaintiff could diminish their motivation to offer an objective assessment. Tr. 459-60. The ALJ gave "no weight" to Dr. Coodley's assessment of mental limitations regarding work activities, concluding it was "simply not sustained" by the evidence. Tr. 463.

At step five, the ALJ found plaintiff was capable of performing past work as a branch manager, computer sales, sales manager, chief executive officer, and recruiter. Tr. 464. This finding is in dispute.

## II. Plaintiff's Allegations of Error

Plaintiff alleges the ALJ erred by (1) failing to update the medical record and obtain medical source statements as required by the Appeals Council remand order; (2) finding plaintiff's colitis with diarrhea and depression to be "non-severe" impairments with no limitations on his work abilities; (3) improperly rejecting lay witness testimony; (4) failing to follow Social Security Rulings in formulating plaintiff's RFC; (5) determining plaintiff could perform past work and other work when that finding was unsupported by the evidence; and (6) relying on conclusory statements by vocational experts regarding numbers of jobs in the economy. Because I find plaintiff's first allegation of error is sufficient to merit reversal in this case, I do not consider plaintiff's remaining

arguments.

In its remand order, this Court directed the ALJ to "evaluate and further develop the medical evidence or record." The Appeals Council, issuing specific remand instructions in response to this Court's order, instructed the ALJ to "[u]pdate the medical record with existing evidence from the treating sources, to include medical source statements" (emphasis added). Plaintiff argues that the ALJ erred in failing to obtain new medical source opinions as required by the Appeals Council's remand order, despite the absence of any such express instruction in this Court's order. Defendant concedes that the ALJ did not obtain new medical source opinions, but contends that because this Court lacks jurisdiction to review the Appeals Council's remand order, only compliance with this Court's remand order (which does not require such statements) is at issue. In the alternative, defendant argues failure to comply with the Appeal's Council directive was not error because the ALJ followed the "spirit" of the remand order. I agree with plaintiff that the ALJ erred in failing to fully comply with the Appeals Council's order.

Defendant argues that this Court lacks jurisdiction to review the ALJ's compliance or non-compliance with the Appeals Council's remand order, relying on cases in other circuits holding that remand orders themselves are not subject to review

by federal courts. Accord Culbertson v. Shalala, 30 F.3d 934, 937 n.3 (8th Cir. 1994); Duda v. Secretary of Health & Human Servs., 834 F.2d 554, 555 (6th Cir. 1987) (per curiam).

However, plaintiff does not seek a review of the remand order itself, but rather the ALJ's compliance or non-compliance with the order. The jurisdictional limit on review of remand orders exists to allow the administrative proceeding to reach finality before it is subject to judicial review. See Port of Boston Marine Terminal Ass'n v. Rederiaktiebolaget Transatlantic, 400 U.S. 62, 71 (1970) (under Administrative Procedure Act, a relevant consideration in determining finality is whether "the process of administrative decisionmaking has reached a stage where judicial review will not disrupt the orderly process of adjudication"). Lack of finality is not an issue in this case. The ALJ's decision has become the final opinion of the Commissioner. It is therefore subject to review by this court for compliance with federal law.

Federal law clearly requires the ALJ to comply with the orders of the Appeals Council. Federal regulations state that: "The administrative law judge shall take any action that is ordered by the Appeals Council and may take any additional action that is not inconsistent with the Appeals Council remand

order." 20 C.F.R. § 404.977(b) (emphasis added).<sup>1</sup> Other courts have recognized that when specific instructions are provided in a remand order, whether that order is issued by the Appeals Council or the federal court, the ALJ must comply. See, e.g., Sandiford v. Astrue, 2009 WL 1773499, at \*7 (M.D. Fla. June 23, 2009); Warren-Ward v. Astrue, 2008 WL 2397390, at \*3 (M.D. Ala. June 10, 2008); see also Thompson v. Barnhart, 2006 WL 709795, at \*12 (E.D. Pa. March 15, 2006) (ALJ committed reversible legal error "by not following the regulations of the Social Security Administration itself which require adherence to the remand orders of the Appeals Council."). I find no basis in the law for concluding that an ALJ's duty to follow the direction of the Appeals Council on remand is obviated by the existence of a district court's remand order, particularly where the Appeals Council order tracks and elaborates on the court order, as in this case.

In Beckman v. Apfel, this Court addressed an ALJ's failure to obtain medical source statements as directed by the

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<sup>1</sup> Defendant accuses plaintiff of "selectively" citing the federal regulations by quoting only the first part of the regulation, apparently implying that an ALJ may either take action as mandated by the Appeals Council or choose to take other action that is "not inconsistent" with the Council's order. This is not what the plain language of the regulation requires. While an ALJ is clearly free to take additional action consistent with the Council's order if he chooses, this in no way diminishes the regulation's clear command that the ALJ "shall" take any action directed by the Appeals Council.



district court on remand. 1999 WL 1087019, at \*5 (D.Or. Aug. 16, 1999). While the ALJ did obtain medical source statements from the plaintiff's treating physician and from one examining physician, he failed to obtain medical source statements from two of the physicians in the case. Id. at \*6. The Court concluded that, "While there were several specific medical source statements before [the] ALJ [], his duty (as stated explicitly by [the Court] in this case) was to request all acceptable medical sources to provide a statement about what a plaintiff can still do despite the plaintiff's impairment." Id. On that basis, and because the Court's explicit instruction had been issued "almost three years" earlier, the Court declared the appropriate remedy was to remand for an award of benefits. Id.

Defendant argues that its failure to comply with the Appeals Council's directives is not error because the ALJ's opinion is "consistent with the spirit" of the Council's remand order. I am not persuaded by this argument for two reasons. First, defendant points to no support in the law for the assertion that following the "spirit" of an order excuses failure to comply with specific directives. Second, the record in this case suggests that the ALJ did not comply with the spirit of either the Council's or this Court's remand order. For example, in his decision, the ALJ concluded that "[c]olitis

did not last for a continuous period of 12 months" and so was non-severe. Tr. 456. The ALJ apparently based this conclusion on his impression that plaintiff "had symptoms . . . in November 2005" but that there were "no additional reports in this regard." Tr. 456. This final statement is wrong. Plaintiff submitted over 100 pages of new medical records on remand. Tr. 588-692. Nearly one-third of these pages refer to plaintiff's diarrhea and other gastrointestinal symptoms between November 2005, and January 2007; in many cases, discussion of symptoms, tests, diagnoses, and treatment is extensive. Tr. 612-647. The ALJ's statement that there were "no additional reports in this regard" suggests that the ALJ not only failed to obtain medical source statements, but failed to review or consider the new medical reports, in direct contravention of both this Court's and Appeals Council's remand orders. The entire paragraph evaluating plaintiff's claims regarding symptoms from colitis appears to be duplicated from the 2006 decision denying benefits.

I note further that failure to obtain medical source statements or, apparently, to consider new medical evidence submitted by plaintiff is not the only way in which the ALJ failed to comply with the remand orders. This Court ordered the ALJ to "further consider Plaintiff's credibility pursuant to SSR 02-1p." The Appeals Council's instruction to "further

evaluate the claimant's subjective complaints and provide rationale in accordance with the disability regulations pertaining to evaluation of symptoms (20 C.F.R. 404.1529) and Social Security Ruling 96-7p" echoes and expands upon this requirement. A thorough review of the 2008 decision shows little change from the 2006 decision sections devoted to credibility analysis. The only additional "consideration" of plaintiff's credibility comes in the form of brief paragraphs stating that (1) plaintiff now has full custody of his two children; (2) at the 2008 hearing, plaintiff expressed "similar complaints" as he had at the 2006 hearing; (3) plaintiff now sometimes uses a cane to help with mobility, though rarely at work because he finds it "embarrassing"; and (4) plaintiff has gained 40 pounds, but the fact there is "no evidence to suggest he has increased his exercise or improved his diet" suggests claimant "does not have a sincere interest" in achieving medical and/or functional improvement. Tr. 459-61. Not a single line of the 2006 credibility analysis appears to have been altered or removed, suggesting the ALJ's "reconsideration" of plaintiff's credibility was cursory at best.

The combination of failure to obtain medical source statements, consider updated medical evidence provided by plaintiff, seek any additional medical evidence or otherwise develop the record, or change any of the 2006 credibility

analysis suggests that the outcome of plaintiff's hearing was predetermined. The Ninth Circuit has cited with approval the adoption of rules designed to "improve the performance of the ALJs by discouraging them from reach[ing] a conclusion first, and then attempt[ing] to justify it by ignoring competent evidence in the record that suggests an opposite result."

Varney v. Secretary of Health and Human Services, 859 F.2d 1396, 1398 (9th Cir. 1988) (adopting a rule crediting subjective pain testimony as true where the ALJ fails to provide specific, sufficient reasons for discrediting such testimony). Remand orders, whether from this Court or from the Appeals Council, are meant to result in meaningful consideration. Their express directives are designed to ensure that such reconsideration actually happens, encouraging the ALJ to revisit a more fully developed record rather than provide post hoc rationalizations.

As in Beckman, the ALJ here failed to follow an express order on remand to obtain updated medical source statements. It also appears the ALJ failed to further develop the record in any way that affected his decision-making process. It has been more than two years since this Court's remand order and nearly two years since the Appeals Council's remand order. I conclude that, as in Beckman, the appropriate remedy in this case is to reverse the ALJ's determination and order the award of benefits

from October 31, 2001, through November 2006.

**CONCLUSION**

The Commissioner's decision is not based on substantial evidence in the record and is therefore reversed and remanded for payment of benefits.

IT IS SO ORDERED.

Dated this 1 day of ~~August~~ <sup>September</sup> 2009.

A handwritten signature in cursive script, appearing to read "Ann Aiken", written over a horizontal line.

Ann Aiken  
United States District Judge